Petition

81-2017

Office - Supreme Court, U.S.
FILED
APR 30 1982
ALEXANDER L. STEVAS
CLERK

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ROSCOE EMORY DEAN, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JUDAH BEST
(Counsel of Record)
STEWART A. BAKER
FILIBERTO AGUSTI

STEPTOE & JOHNSON
Chartered
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 862-2000

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Does outrageous government conduct provide a defense against prosecution?

2. What procedures should be used to evaluate a claim of outrageous government conduct?

3. What constitutes agreement as to the essential nature of a conspiracy?

4. An additional question, which will be briefed in a related petition, is incorporated into this petition. It is:

Whether the trial court deprived appellants of their constitutional rights by denying them the right to submit certain audio tapes to expert testing and analysis?

PARTIES

In addition to the parties listed in the caption of this petition, John Thomas Bigley was a codefendant and coappellant in the proceedings below. Mr. Bigley is also filing a petition for certiorari that will incorporate the questions presented above and will brief the question listed in paragraph 4.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties	ii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	2
Applicable Constitutional Provisions and Statutes	2
Statement of the Case	2
Reasons for Granting the Writ	9

TABLE OF AUTHORITIES

Cases	Page
Bailey v. People, 630 P.2d 1062 (Colo. 1981)	10
Blumenthal v. United States, 332 U.S. 539 (1947)	15
Brady v. Maryland, 373 U.S. 83 (1963)	8
Hampton v. United States, 425 U.S. 484 (1976)	*passim*
People ex rel. Difanis v. Boston, 92 Ill. App. 3d 962, 416 N.E.2d 333 (1981)	10
People v. Adams, 53 N.Y.2d 241, 423 N.E.2d 379 (1981)	11
People v. Isaacson, 44 N.Y.2d 511, 378 N.E.2d 78 (1978)	10
Richardson v. Indianapolis, 658 F.2d 494 (7th Cir. 1981)	15
State v. Apt, 244 N.W.2d 801 (Iowa 1976)	11
State v. Eshuk, 347 So.2d 704 (Fla. Dist. Ct. App. 1977)	10
State v. Ford, 276 N.W.2d 178 (Minn. 1979)	13
State v. Gibb, 303 N.W.2d 673 (Iowa 1981)	11
State v. Jones, 598 S.W.2d 209 (Tenn. 1980)	11
State v. Morris, 272 N.W.2d 35 (Minn. 1978)	10
State v. Paiz, 91 N.M. 5, 569 P.2d 415 (Ct. App.), *cert. denied*, 569 P.2d 413 (1977)	10
State v. Talbot, 71 N.J. 160, 364 A.2d 9 (1976)	11
Sylar v. Mississippi, 340 So.2d 10 (Miss. 1976)	11
Townsend v. State, 418 N.E.2d 554 (Ct. App. Ind. 1981)	11
United States v. Alexandro, No. 81-1435 (2d Cir. Mar. 18, 1982)	14
United States v. Anderton, 629 F.2d 1044 (5th Cir. 1980)	10
United States v. Bagnariol, 665 F.2d 877 (9th Cir. 1981)	13
United States v. Bracy, 566 F.2d 649 (9th Cir. 1977), *cert. denied*, 439 U.S. 818 (1978)	16
United States v. Carson, 615 F.2d 920 (1st Cir. 1980)	14
United States v. Feola, 420 U.S. 671 1975)	15

TABLE OF AUTHORITIES—Continued

	Page
United States v. Franklin, 608 F.2d 241 (6th Cir. 1979)	15
United States v. Gonzales-Benitez, 537 F.2d 1051 (9th Cir.), *cert. denied*, 429 U.S. 923 (1976)	13
United States v. Graves, 556 F.2d 1319 (5th Cir. 1977), *cert. denied*, 435 U.S. 923 (1978)	10, 13
United States v. Hammond, 598 F.2d 1008 (5th Cir. 1979)	13
United States v. Hinkle, 637 F.2d 1154 (7th Cir. 1981)	14
United States v. Jannotti, 501 F. Supp. 1182 (E.D. Pa. 1980), *rev'd*, Nos. 81-1020, 81-1021 (3d Cir. Feb. 11, 1982) (in banc)	11, 14
United States v. Johnson, 565 F.2d 179 (1st Cir. 1977), *cert. denied*, 434 U.S. 1075 (1978)	12, 14
United States v. Johnson, 645 F.2d 865 (10th Cir. 1981), *cert. denied*, 102 S. Ct. 329 (1981)	15
United States v. Kates, 508 F.2d 308 (3d Cir. 1975)	16
United States v. Leja, 563 F.2d 244 (6th Cir. 1977), *cert. denied*, 434 U.S. 1074 (1978)	10
United States v. Lentz, 624 F.2d 1280 (5th Cir. 1980), *cert. denied*, 450 U.S. 995 (1981)	10, 13
United States v. Marcello, 508 F. Supp. 586 (E.D. La. 1981)	11, 13, 14
United States v. McQuin, 612 F.2d 1193 (9th Cir.), *cert. denied*, 445 U.S. 955 (1980)	13
United States v. Mohabir, 624 F.2d 1140 (2d Cir. 1980)	15
United States v. Myers, 510 F. Supp. 319 (E.D. N.Y. 1980)	13, 14
United States v. Nicoll, 664 F.2d 1308 (5th Cir. 1982)	10
United States v. Nunez-Rios, 622 F.2d 1093 (2d Cir. 1980)	14
United States v. Pintar, 630 F.2d 1270 (8th Cir. 1980)	15
United States v. Prairie, 572 F.2d 1316 (9th Cir. 1978)	9

TABLE OF AUTHORITIES—Continued

	Page
United States v. Quinn, 543 F.2d 640 (8th Cir. 1976)	9, 12
United States v. Reynoso-Ulloa, 548 F.2d 1329 (9th Cir. 1977), *cert. denied*, 436 U.S. 926 (1978)	13
United States v. Rosenblatt, 554 F.2d 36 (2d Cir. 1977)	16
United States v. Russell, 411 U.S. 423 (1973	12
United States v. Steinberg, 551 F.2d 510 (2d Cir. 1977)	9
United States v. Stubbert, 655 F.2d 453 (1st Cir. 1981)	15
United States v. Szycher, 585 F.2d 443 (10th Cir. 1978)	9, 12
United States v. Twigg, 588 F.2d 373 (3d Cir. 1978)	9, 12
Statutes	
18 U.S.C. § 963	7
18 U.S.C. § 3924(c)(2)	7
28 U.S.C. § 1254(1)	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. —

ROSCOE EMORY DEAN, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Roscoe Emory Dean, Jr., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.[1]

OPINIONS BELOW

The findings of fact and conclusions of law by the district court concerning government misconduct were not reported. *See* Appendix to Petition (hereinafter "Pet. App.") at 5a, 13a. The opinion of court of appeals was reported at 666 F.2d 174. *See* Pet. App. at 17a.

---

[1] The appellate decision was rendered by Unit B of the old Fifth Circuit, which has now become the Eleventh Circuit. The mandate issued from the Eleventh Circuit. *See* Pet. App. at 1a.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on January 22, 1982. *See* Pet. App. at 1a. A timely Petition for Rehearing was denied on March 23, 1982. *See* Pet. App. at 3a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

APPLICABLE CONSTITUTIONAL PROVISIONS AND STATUTES

The Due Process clause of amendment XIV of the United States Constitution provides: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

Roscoe Emory Dean, Jr. ("Dean") was a Georgia state senator who finished second in the 1978 Democratic primary to the present Governor of Georgia. After the election, Dean continued to be a prominent critic of the Governor on a broad range of political issues. It was widely speculated that Dean would again seek the governorship in 1982.

On May 14, 1980, Dean was convicted of conspiring with one of his acquaintances to import cocaine, marijuana and methaqualone in a scheme substantially created by state government agents, including an attorney who advised Dean about the legality of the scheme. Apart from Dean and one of his acquaintances, all of the participants in the purported drug ring were agents of the Georgia Bureau of Investigation ("GBI"). In a departure from usual state practice, the government agents apparently acted under direct orders from Dean's political rival, the Governor of Georgia. In fact, no drugs were imported, no cash passed hands, and the entire enterprise was fabricated by the GBI and the Governor.

At Dean's trial, the Government introduced evidence that in early July 1979, Dean asked James H. Chaffin ("Chaffin"), a nightclub manager, to introduce him to someone with connections in the South American drug importation trade. Chaffin testified that Dean planned to seek financial contributions from such a person for his 1982 gubernatorial campaign in exchange for a promise to facilitate the importation of drugs along the coast of Georgia if he became governor.

On July 17, 1979, Chaffin was arrested on charges of keeping a house of prostitution, a state criminal offense. Chaffin had earlier been convicted of aggravated assault; his four-year sentence was then on appeal. During consultations on these matters with his attorney, Hirsch Friedman ("Friedman"), Chaffin discussed his alleged conversation with Dean. Chaffin and Friedman decided to use this information to bargain with the state authorities for leniency and met with them on July 19. The GBI expressed interest in their offer and arranged for both Chaffin and his attorney, Friedman, to become informants.

In a telephone conference about a few weeks later, Chaffin introduced Friedman to Dean as a lawyer who represented clients with drug importation connections.[2] Dean and Friedman agreed to meet on Jekyll Island, Georgia on August 24.

At this meeting, Friedman told Dean that he represented drug smugglers who could provide Dean with $10 million in campaign contributions in return for Dean's assistance. (This was more than forty times the $243,000 Dean actually spent in his 1978 campaign and more than

---

[2] From this point on, Friedman was the chief state government agent. Chaffin had little additional contact with Dean. After testifying against Dean at his trial, Chaffin's four-year sentence was commuted by the State Board of Pardons and Paroles to sixteen hours.

thirty times the $323,500 that the winner spent. See campaign finance reports lodged with the Court in connection with Application No. A-894.) From the outset of these discussions Friedman sought to impress Dean with his expertise as a practicing attorney.[3] And Friedman suggested that Dean could rely on that expertise in their planning:

> I've got a six-man law firm, I own the building, I've got an accounting background.
>
> All I can say to you, Roscoe, is that ah, anybody ever catches me, all they've got is one stupid lawyer.

Transcript, Volume V, pp. 56, 151.

The GBI was apparently concerned that until Dean participated in an overt act pursuant to a conspiracy, he was not in a conspiracy. Thus, Friedman, on behalf of the GBI, began an intensive effort to persuade Dean to agree to "assist" a narcotics importation. Through numerous telephone calls and meetings in September 1979, Dean consistently refused.

Beginning at least in September 1979—and perhaps earlier—the Governor of Georgia actively participated in the ensnarement of his political opponent.[4] At that time, the Governor called Georgia's Attorney General into his office. In the words of the Attorney General, the Governor wanted to "get" Dean by any means possible: "[T]here was no specific crime ever discussed, because

---

[3] The defendant introduced uncontroverted expert testimony by the Dean of Emory Law School that Friedman entered into an attorney-client relationship with Dean.

[4] The trial court's denial of defendant's attempts to conduct discovery on the extent of the government misconduct in this case has limited the defendant to reliance on public statements by government officials, which were duly introduced into the record. For all the defendant knows, the Governor was involved in this plan from the outset. The defendant's allegations were accepted by the court as true in the denial of the defendant's motion for an evidentiary hearing. *See infra* p. 8; Pet. App. at 14a.

my mission was to find anything that Roscoe had done that we could hang on him. That was the whole purpose." Record at 810.

The GBI intensified its efforts. On October 12, 1979, Friedman brought Sergio Abreu, a law enforcement agent posing as a Colombian drug boss, to Dean in a final attempt to get him to agree to a "dry run" plan. But the GBI was still unsuccessful; Dean refused to go along with a dry run.

After the October 12 meeting, the Georgia Attorney General and his staff reviewed the evidence against Dean and concluded that it did not warrant prosecution. They further consulted the United States Attorney for the Northern District of Georgia, who concluded that the evidence would not support charges that any federal law had been violated.

Nonetheless, the Governor was determined to continue stalking Dean. In December, he ordered the GBI back out to try again, supplying the agency with $500,000 from the Governor's emergency fund for use in the investigation. On January 9, 1980, Friedman called Dean and proposed a January 11 meeting to discuss the plan once more. At the meeting, Friedman stressed that the drug group would require Dean's complicity in at least one importation as a prerequisite to payment. Friedman characterized this condition as "not tremendous, but it's a major thing about something you didn't want to do, but ah . . . they feel you have to." Dean again refused. To meet the Governor's demand, Friedman turned to more heavy-handed tactics.

Friedman offered to raise the group's payment to $50 million. He threatened to make payments to another potential gubernatorial candidate. And he predicted a "Roscoe Dean dynasty" if Dean went along. Although willing to talk big, Dean feared that offering drug importers any present assistance would commit him to a

criminal conspiracy. Friedman overcame Dean's fears through false legal advice. He assured Dean that there would be insufficient evidence of participation in a conspiracy if he agreed to an importation:

> Dean: But I . . . I can't get this, now you're smarter than I am. I know you are. You passed the Bar and I never did. You . . . you . . . you have to be smarter. But you, there's
>
> Friedman: I could have also been lucky, which I probably think I was.
>
> Dean: Well let me ask you a question. I . . . I has respect for you on that that . . . .
>
> Dean: Well let me finish now. . . . After that, I want to know, now here's what to happen. There is no flim flam cause I never have control of the money. I don't want your damn money. I don't want any money out of there for expenses. I ain't going to take no money out of there for expenses.
>
> Friedman: They want to be able to trust you to the point that they can just trust you.
>
> Dean: Well, if I take money and . . . . We've showed 'em a place, they're bringing stuff in. I'm part of a damn conspiracy . . . .
>
> Friedman: Well then tell . . . tell me how you want to handle it now.
>
> Dean: How would you handle it if you was in my shoes? How would you
>
> Friedman: I would handle it the way I'm told I would handle it. . . .
>
> Dean: Because then I'm a part of a conspiracy. I pointed out the place. I pointed out the damn place. . . .
>
> Friedman: No, do you know why?
>
> Dean: Why? (inaudible)

> Friedman: Because [the government] could never ever prove that you were part of it. You wouldn't be there that evening.

Transcript, Volume VII, pp. 117-23. Presented with this advice, Dean finally agreed. Dean's principal contribution to the conspiracy was to point out a place for the importation; he pointed out the public airport on Jekyll Island, Georgia.

Evidently concerned that the entire conspiracy consisted of government agents, Friedman now sought to obtain a non-government "co-conspirator" for Dean. He agreed with Dean that one of Dean's acquaintances, John Thomas Bigley ("Bigley"), would meet Friedman at a bank in Savannah, Georgia to count the payment. This was Bigley's first appearance in the alleged conspiracy. Bigley counted the money on January 18,[5] but did not express to government agents any knowledge of the plan. On January 23 and 24, the GBI orchestrated two landings involving numerous government agents, government-financed freight boxes, camper vehicles, helicopter and a phony cargo ship. Specially fitted cameras were aimed at the scene by a number of agents in nearby vans.[6] Dean and Bigley were arrested on January 28, 1980. On May 14, 1980, they were convicted in federal district court of three counts of conspiracy to import drugs in violation of 18 U.S.C. § 963. (Bigley was also convicted of possessing a firearm during the commission of a felony in violation of 18 U.S.C. § 3924(c)(2).)

---

[5] Bigley testified that he had no knowledge that a drug transaction was involved; he was under the impression that the $10 million was part of a confidential real estate transaction. *See* p. 16 *infra*.

[6] The GBI agent in charge of this operation was subsequently appointed by the Governor of Georgia to be head of the GBI. This was the first time in Georgia history that an agent had been so promoted from the ranks.

Before trial, the defense moved to dismiss the indictment or suppress evidence on the grounds that the government's use of attorney Friedman's legal expertise to conclude the agreement constituted gross governmental misconduct under *Hampton v. United States*, 425 U.S. 484 (1976). At the time, despite having sought government information by motion under *Brady v. Maryland*, 373 U.S. 83 (1963), the defense had no knowledge about the Governor's extensive involvement in and assistance to the creation of Dean's crime. The district judge, B. Avant Edenfield, denied the motion. *See* Pet. App. at 5a.

On May 29, 1981, just after the return of the verdict in Dean's case, the Georgia Attorney General disclosed in some detail the Governor's role in the Dean "investigation" in an interview with the *Atlanta Constitution*. The defense promptly moved for a new trial or an evidentiary hearing on the new allegations of government misconduct. Judge Edenfield assumed the defendant's allegations were true, but denied the motion:

> Any offer by Governor Busbee to assist in financing a prosecution of Dean by the State of Georgia is immaterial to the issues tried before this Court. The Court does not feel this matter would be relevant to the entrapment defense with which the Court allowed the defendants to proceed. . . .
>
> Likewise, the Court can find nothing material to the issues in this case in Governor Busbee's alleged request of Attorney General Bolton to prosecute Dean.

See Pet. App. at 14a-16a.

At trial the district court similarly had prevented inquiry of witnesses that would have disclosed the role of the Governor in the Dean investigation. Even before trial, Judge Edenfield had ruled that defense counsel could not ask Friedman about facts relevant to the

outrageous conduct claim because Dean would not waive his right to remain silent.

The courts of appeals affirmed this action in a footnote, stating that the alleged government conduct fell "well within" the "outer limits" of "permissible conduct by the government in pursuing the end of ferreting out crime." 666 F.2d at 180 n.7. *See* Pet. App. at 27a.

REASONS FOR GRANTING THE WRIT

I. DOES OUTRAGEOUS GOVERNMENT CONDUCT PROVIDE A DEFENSE AGAINST PROSECUTION?

This case raises a question left unresolved by a sharply divided Court in *Hampton v. United States*, 425 U.S. 484 (1976). In *Hampton*, the defendant argued that he could not lawfully be convicted of selling narcotics that government agents had themselves supplied. The Court ruled 5-3 (with Justice Stevens not participating) that entrapment is a defense available only to defendants who were not predisposed to commit the crime. The five-member majority divided, however, on the question whether the principles of fundamental fairness in the due process clause protect even predisposed defendants against particularly outrageous government conduct. Justice Rehnquist, joined by the Chief Justice and Justice White, rejected this defense. *Id.* at 490. Justices Powell and Blackmun left the issue open. *Id.* at 495. The three dissenters embraced a due-process defense of egregious government conduct. *Id.* at 499.

The Court has not returned to the question since, and the circuits have predictably diverged. Since *Hampton*, four circuits have adopted the "outrageous conduct" defense. *United States v. Quinn*, 543 F.2d 640, 648 (8th Cir. 1976); *United States v. Twigg*, 588 F.2d 373, 379-80 (3d Cir. 1978); *United States v. Prairie*, 572 F.2d 1316, 1319 (9th Cir. 1978); *United States v. Szycher*, 585 F.2d 443 (10th Cir. 1978). Others have noted the confusion and refused to take a position. *United States*

v. Steinberg, 551 F.2d 510 (2d Cir. 1977); *cf. United States v. Leja*, 563 F.2d 244 (6th Cir. 1977), *cert. denied*, 434 U.S. 1074 (1978). The stance of the Eleventh Circuit, from which this case comes, is unclear.[7]

State courts have fared no better. Three states have taken *Hampton* as a mandate to recognize a government misconduct defense that is binding on the states under the due process clause of the fourteenth amendment. *See State v. Eshuk*, 347 So.2d 704, 707 (Fla. Dist. Ct. App. 1977); *State v. Morris*, 272 N.W.2d 35, 36 (Minn. 1978); *cf. State v. Paiz*, 91 N.M. 5, 569 P.2d 415 (Ct. App.), *cert. denied*, 569 P.2d 413 (1977) (lower court asks state supreme court to re-examine prior state rule in light of *Hampton*). Other states have regarded *Hampton* as inconclusive, but have nonetheless adopted the defense on a fourteenth amendment basis.[8] *People ex rel. Difanis v. Boston*, 92 Ill.

---

[7] The uncertainty is inherited from the old Fifth Circuit. In 1977 a panel of the old Fifth Circuit seemed to embrace the "outrageous conduct" defense. United States v. Graves, 556 F.2d 1319, 1324 (5th Cir. 1977), *cert. denied*, 435 U.S. 923 (1978). In 1980, however, another panel of the old Fifth "emphasize[d] that we do not decide, that the conduct of government agents could be so excessive and outrageous as to bar, on due process grounds, prosecution for a particular crime." United States v. Lentz, 624 F.2d 1280, 1287 (5th Cir. 1980), *cert. denied*, 450 U.S. 915 (1981). The panel in *Graves* was composed of judges now sitting in the Eleventh Circuit; the appeals court judges who decided *Lentz* now sit in the new Fifth Circuit. *See also* United States v. Nicoll, 664 F.2d 1308, 1315 (5th Cir. 1982) ("[W]e recognize that cases may arise in which the government's conduct is so egregious as to violate due process, *see generally* Hampton v. United States. . . ."); United States v. Anderton, 629 F.2d 1044, 1047 n.2 (5th Cir. 1980) ("If a governmental misconduct defense survives *Hampton* at all, it is a question of law, not for submission to the jury.")

[8] Other states have found *Hampton* to be persuasive authority in establishing a government misconduct defense under state due process provisions. *See* Bailey v. People, 630 P.2d 1062, 1068 (Colo. 1981); People v. Isaacson, 44 N.Y.2d 511, 378 N.E.2d 78,

App. 3d 962, 416 N.E.2d 333, 337 (1981); *State v. Apt*, 244 N.W.2d 801, 803-04 (Iowa 1976); *but cf. State v. Gibb*, 303 N.W.2d 673, 676 (Iowa 1981) (suggesting that whether a government misconduct defense exists is not yet established); *cf. Townsend v. State*, 418 N.E.2d 554 (Ct. App. Ind. 1981) (semble). Still others appear to view *Hampton* as relating to the federal courts' supervisory power over federal officials and thus not controlling on state courts. *See State v. Talbot*, 71 N.J. 160, 364 A.2d 9, 12 (1976); *Sylar v. Mississippi*, 340 So.2d 10, 12 (Miss. 1976).

Police and prosecutors have not responded to this uncertainty with restraint. Rather, the years since *Hampton* have seen an explosion of elaborate government undercover operations designed to enmesh politicians, labor leaders, and others in criminal schemes largely financed, staffed, and organized by the government. *See, e.g., United States v. Jannotti*, 501 F. Supp. 1182 (E.D. Pa. 1980), *rev'd*, Nos. 81-1020, 81-1021 (3d Cir. Feb. 11, 1982) (in banc) ("Abscam"); *United States v. Marcello*, 508 F. Supp. 586 (E.D. La. 1981) ("Brilab"). More than ever, lower courts need definitive guidance from this Court to evaluate the numerous due process claims arising from such operations.

Dean's claim, like all cases presenting the question left unanswered in *Hampton*, turns ultimately on the particular facts of his case. It is not atypical in some respects—the targeting of a prominent political figure and the massive commitment of government resources to transform idle talk into vast conspiracy. In other respects—the direct intrusion into the investigation by Dean's political rival and the use of a criminal defense attorney as chief government agent—Dean's case simply

---

82-83 (1978); *accord*, People v. Adams, 53 N.Y.2d 241, 423 N.E.2d 379, 383 (1981); *cf.* State v. Jones, 598 S.W.2d 209, 218-20 (Tenn. 1980) (semble).

represents the culmination of tendencies latent in all such operations. The fact that the misconduct was largely that of state agents offers this Court an opportunity to consider the extent to which any "outrageous conduct" defense rests on supervisory rather than constitutional grounds.

II. WHAT PROCEDURES SHOULD BE USED TO EVALUATE A CLAIM OF OUTRAGEOUS GOVERNMENT CONDUCT?

At the least, Dean's due process claim should have been explored and findings made in a separate post-trial hearing before the district court. No such hearing was held. This failure illustrates the procedural confusion that has followed in the wake of *Hampton*.

In reserving the possibility of an "outrageous conduct" defense, Justices Powell and Blackmun did not address the question whether judge or jury should find the facts needed to rule on the defense. The three dissenters adopted Justice Stewart's stricture in an earlier case that "the determination of the lawfulness of the Government's conduct must be made—as it is on all questions involving the legality of law enforcement methods—by the trial judge, not the jury." 425 U.S. at 497 (quoting *United States v. Russell*, 411 U.S. 423, 441 (1973)).

Even this passage, while it plainly allows the court to decide whether particular police conduct violates due process, does not say whether judge or jury should resolve factual disputes over what conduct occurred. Some courts, noting this ambiguity and Justice Powell's silence, have left open the question whether judge or jury decides such disputes. *See United States v. Johnson*, 565 F.2d 179, 181-82 (1st Cir. 1977), *cert. denied*, 434 U.S. 1075 (1978); *United States v. Twigg*, 588 F.2d 373, 379 n. (3d Cir. 1978). Others have concluded that the judge should determine both facts and law. *United States v. Szycher*, 585 F.2d 443, 445, 449 (10th Cir. 1978); *United States v. Quinn*, 543 F.2d 640, 647-48 (8th Cir.

1976); *United States v. Marcello*, 508 F. Supp. 586, 592 (E.D. La. 1981); *United States v. Myers*, 510 F. Supp. 319, 323 (E.D.N.Y. 1980); *State v. Ford*, 276 N.W.2d 178, 182 (Minn. 1979).

The United States has argued, in contrast, that the government misconduct defense should be presented to the jury. *United States v. Graves*, 556 F.2d 1319, 1321 (5th Cir. 1977), *cert. denied*, 435 U.S. 923 (1978). One court has also suggested that a defendant can "develop fully his *Hampton* claim" at trial, where he "will be able to call his defense witnesses and they can testify to the government's participation." *United States v. Hammond*, 598 F.2d 1008, 1015 n.6 (5th Cir. 1979). The most disturbing cases seem to hold that a jury verdict rejecting an entrapment defense resolves questions of fact against the defendant for purposes of his outrageous conduct defense.[9] Like the trial court's bizarre notion that Dean must waive his fifth amendment privilege to assert a due process right, these suggestions may be the result only

---

[9] See United States v. Reynoso-Ulloa, 548 F.2d 1329, 1339 n.23 (9th Cir. 1977), *cert. denied*, 436 U.S. 926 (1978) (rejecting due process claim based on allegation that government agents threatened defendant into committing crime because "[t]he jury had a full opportunity to consider the [allegedly threatening] statement in view of all the surrounding circumstances"); United States v. McQuin, 612 F.2d 1193, 1196 (9th Cir.), *cert. denied*, 445 U.S. 955 (1980) (defendant claimed that after helping to plan a robbery he was prevented from withdrawing by the threats of a government agent; due process argument rejected because "jury clearly declined to accept [his] story" when it found no predisposition); United States v. Lentz, 624 F.2d 1280, 1288 (5th Cir. 1980), *cert. denied*, 450 U.S. 995 (1981) (rejecting due process claim of outrageous conduct because "the jury could have believed that [the defendant] conceived the entire plan"); United States v. Bagnariol, 665 F.2d 877, 883 (9th Cir. 1981) ("Treating the evidence in the light most favorable to the government, as we must," claim of due process violation rejected); *but cf.* United States v. Gonzales-Benitez, 537 F.2d 1051, 1055 (9th Cir.), *cert. denied*, 429 U.S. 923 (1976) (accepting defendant's version of disputed facts in analyzing due process claim).

of carelessness or confusion rather than settled policy, but in an area so frequently litigated, that confusion is itself a reason for seeking guidance from this Court.

Similar uncertainty surrounds the question of when the defense must be raised. The Second Circuit is firmest; it requires that the claim be asserted by an attack on the indictment before trial; otherwise the defense is waived. *United States v. Nunez-Rios*, 622 F.2d 1093 (2d Cir. 1980). The United States apparently takes the same view. *See United States v. Alexandro*, No. 81-1435 (2d Cir. Mar. 18, 1982). After finding no government misconduct in *Alexandro*, a panel of the Second Circuit noted that "the Government, in its brief, argues that Alexandro waived his right to assert the due process defense by failing to raise it in a pretrial motion. We decline to express our views on this contention because our decision obviates the need to reach its merits." *Id.*, slip op. at n.17.

First Circuit practice is to the contrary; there the defense may be raised in motion for a directed verdict of acquittal. *United States v. Johnson*, 565 F.2d 179 (1st Cir. 1977), *cert. denied*, 434 U.S. 1075 (1978); *United States v. Caron*, 615 F.2d 920 (1st Cir. 1980). The Seventh Circuit may take the same view. *See United States v. Hinkle*, 637 F.2d 1154 (7th Cir. 1981). In fact, when the defense is raised before trial, many courts postpone their rulings until after trial so that evidence taken at trial may be supplemented at a post-trial hearing. *United States v. Marcello*, 508 F. Supp. 586 (E.D. La. 1981); *United States v. Myers*, 510 F. Supp. 319, 323 (E.D.N.Y. 1980). *See also United States v. Jannotti*, 501 F. Supp. 1182, 1184 (E.D. Pa. 1980), *rev'd*, Nos. 81-1020, 81-1021 (3d Cir. Feb. 11, 1982) (in banc).

This case offers an opportunity to clarify the procedural as well as the substantive confusion surrounding the government misconduct defense. Dean requested a post-trial hearing on his government misconduct defense.

At the hearing, the trial judge should have made findings based both on the evidence at trial and on any additional evidence relevant to the issue. The jury has no more place in evaluating this defense than in evaluating a search-and-seizure claim; certainly its rejection of the entrapment claim should not be treated as impliedly finding all relevant facts against Dean. Finally, this case shows the shortcomings of the Second Circuit's requirement that the misconduct defense be raised before trial and without a full opportunity to evaluate evidence arising during or after trial.

III. WHAT CONSTITUTES AGREEMENT AS TO THE ESSENTIAL NATURE OF A CONSPIRACY?

In order to obtain a conspiracy conviction against Dean, the government sought the conviction of Bigley on the barest evidence. This evidence cannot support a finding that Dean and Bigley agreed as to the essential nature of the conspiracy with which they were charged. The court of appeals' decision in the Dean case reflects an underlying uncertainty in the circuits about the "essential nature" requirement.

This Court first addressed the requirement that conspirators must agree on the "essential nature of the plan" in *Blumenthal v. United States*, 332 U.S. 539, 557 (1947), and it has infrequently returned to it. *See United States v. Feola*, 420 U.S. 671, 692, 695 (1975).

Heretofore, the circuits were united in requiring substantial proof of agreement of the essential nature of the plan.[10] And this rule has been interpreted to provide

---

[10] *See, e.g.*, Richardson v. Indianapolis, 658 F.2d 494, 500 (7th Cir. 1981); United States v. Stubbert, 655 F.2d 453, 456-57 (1st Cir. 1981); United States v. Johnson, 645 F.2d 865, 868 n.2 (10th Cir. 1981), *cert. denied*, 102 S. Ct. 329 (1981); United States v. Pintar, 630 F.2d 1270, 1276 (8th Cir. 1980); United States v. Mohabir, 624 F.2d 1140, 1143 (2d Cir. 1980); United States v.

that agreement as to one crime is insufficient to sustain a conspiracy conviction as to another. *See United States v. Rosenblatt*, 554 F.2d 36, 39 (2d Cir. 1977).

The present case represents a departure from these principles. The court of appeals asked whether "Bigley knew of the narcotics-related purpose of the activities involving himself, Dean and Friedman," rather than whether Bigley entered into an agreement with knowledge of its essential terms. 666 F.2d at 178. Even on its own terms, the lower court's ruling was wrong, for the only evidence suggesting Bigley knew anything about narcotics was an isolated conversation in which Friedman said he had a friend who died in Colombia and Bigley responded with the observation that Colombia was "pot country."

The court of appeals listed other scraps of evidence suggesting that Bigley knew Dean was up to no good, but it found nothing more concerning drugs, the supposed central feature of the conspiracy. *See* Pet. App. at 22a-23a. Under *Blumenthal* and its progeny, this does not evidence an agreement as to any plan with identifiable essential features. Without such evidence, there can be no conspiracy, for "the gist of the [conspiracy] offense remains the agreement." *United States v. Rosenblatt*, 554 F.2d at 39.

This case thus offers an opportunity to provide circuits with needed specific direction on the scope of the "essential nature" requirement, which the Court has not developed in thirty years. Without such direction, the lower courts may be inclined to follow the court of ap-

---

Franklin, 608 F.2d 241, 246 (6th Cir. 1979); United States v. Bracy, 566 F.2d 649, 659 (9th Cir. 1977), *cert. denied*, 439 U.S. 818 (1978); United States v. Kates, 508 F.2d 308, 310-12 (3d Cir. 1975).

peals in reading all significant protection out of that requirement.

Respectfully submitted,

JUDAH BEST
(Counsel of Record)
STEWART A. BAKER
FILIBERTO AGUSTI

STEPTOE & JOHNSON
Chartered
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 862-2000

April 30, 1982

Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 80-7466

D.C. Docket No. CR480-13

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

VERSUS

ROSCOE EMORY DEAN, JR., and
JOHN THOMAS BIGLEY,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Georgia

---

Before RONEY, VANCE and RANDALL, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same

is hereby affirmed in part, and vacated in part; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court.

January 22, 1982

A True Copy
Attested
Clerk,
U.S. Court of Appeals
Fifth Circuit

By /s/ Linda G. Pritt
Deputy Clerk
Atlanta, Ga.

Issued as Mandate: Apr. 2, 1982

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNIT B

No. 80-7466

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
VERSUS
JOHN THOMAS BIGLEY,
Defendant-Appellant.

Filed Mar. 23, 1982

Appeal from the United States District Court for the Southern District of Georgia

---

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion January 22, 1982, 5 Cir., 198–, —— F.2d ——)
(March 23, 1982)

Before RONEY, VANCE and RANDALL, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge of this Administrative Unit in regular active service having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the judges in regular active service of this Administrative Unit having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is also DENIED.

( ) A member of this Administrative Unit in active service having requested a poll on the reconsideration in this cause en banc, and a majority of the judges in active service of said unit not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Robert S. Vance
United States Circuit Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

CR480-13

UNITED STATES OF AMERICA,
Plaintiff

vs.

ROSCOE EMORY DEAN and
JOHN THOMAS BIGLEY,
a/k/a MOORE,
Defendants

ORDER ON THE MOTION TO SUPPRESS THE SEIZURE OF ITEMS FROM DEFENDANT DEAN'S AUTOMOBILE AND THE MOTION TO DISMISS INDICTMENT ON THE BASIS OF OUTRAGEOUS AND UNLAWFUL INVESTIGATIVE GOVERNMENT CONDUCT

Defendants Dean and Bigley were arrested on January 28, 1980 in the parking lot of the Savannah Civic Center. Defendants were arrested by Atlanta Attorney Hirsch Friedman who is a consultant to the Georgia Bureau of Investigation (GBI) on organized crime. Defendants claim Friedman's conduct violated defendants' due process rights and that evidence seized from defendant Dean's automobile pursuant to the arrest should be suppressed. The facts concerning the investigation and arrest of these defendants are as follows:

Hirsch Friedman, an Atlanta lawyer who occupies the position as a consultant to the Georgia Bureau of Investigation, began a relationship with defendant Roscoe Dean on or about August 22, 1979. This relationship began via a telephone call from Friedman's law offices in Atlanta, Georgia to Roscoe Dean in the Southern District

of Georgia. This telephone conversation was recorded by Friedman on an office tape recorder. Over the next six months Friedman had approximately thirty-five conversations with defendant Dean, all of which were recorded. Approximately twenty conversations were over the telephone, the remaining conversations were person to person conversations between Friedman and Dean.

Friedman held himself out to be the representative or spokesman for a group of persons who were involved in marihuana and cocaine traffic. Friedman represented that these people were interested in bringing in controlled substances through the coastal Georgia area. Dean, in exchange for monies to help finance a gubernatorial bid, promised or agreed to help Friedman or Friedman's so-called clients in bringing drugs into the Georgia coastal area.

In January of 1980 a dry run was made in which Dean was led to believe that marihuana was brought into the State. At all times Friedman was acting in his role as a GBI consultant.

On January 28, 1980, Friedman flew to Savannah from Atlanta in a Georgia Department of Transportation airplane. Friedman was picked up in front of the Savannah Airport by defendant Dean who was driving his own car. Friedman was carrying an athletic bag. Inside the athletic bag was a small vinyl bag which contained $63,000 in cash. This $63,000 was to be used to pay Dean for his assistance in the dry run which had occurred a few days previously.

Friedman entered Dean's car and took the small vinyl bag out of the athletic bag and placed it on the transmission hump in front of the front seat. Friedman was wearing a body recorder on his leg as well as a device known as a T-2 transmitter. Dean began driving toward Savannah. Friedman testified they were supposed to go to the C & S Bank located on Bull Street in downtown

Savannah. Supposedly, $10,000,000 in cash was to be picked up at the C & S Bank.

Before arriving in Savannah, Dean pulled over to the side of the road and got out of the car. Another car stopped in front of Dean and Friedman recognized the driver of that car as defendant Bigley. Dean went to Bigley's car where the two spoke briefly. Dean came back to the car and told Friedman that Bigley thought they were being followed. Bigley then approached the car and Friedman could see that Bigley was carrying a pistol in a shoulder holster. Bigley reported that he had observed a person talking into a walkie-talkie and he thought the police were following them. Friedman labeled Bigley as Dean's counter-surveillance man.

The men got back into their cars and continued the drive to Savannah. Along the drive back to Savannah, Dean told Friedman that Bigley thought Friedman to be an undercover agent.

Approximately twenty to thirty minutes later the two cars arrived in the parking lot of the Savannah Civic Center. The two cars stopped. Defendant Dean got out of his car, leaving the car door open, walked over to Bigley's car and entered into a conversation with Bigley. Bigley's car was parked approximately fifty feet to the left of Dean's vehicle. During the conversation between Dean and Bigley, both men's backs were turned to Friedman who was still sitting in the car.

Approximately two minutes after Dean exited the car, Friedman got out of Dean's car, pulled out a Colt 357 Magnum which he was carrying and approached the two defendants. Bigley turned toward Friedman at which point Friedman took out his credentials and stated, "Gentlemen, kindly raise your hands over your head. You're under arrest." Bigley asked, "What for," to which Friedman responded, "You're under arrest for violation of federal drug laws."

Friedman contends and also the Government that the arrest was made under Ga. Code § 27-211 which is the statutory provision for a citizen's arrest. Friedman testified he had no authority under his consultant relationship with the GBI to make an arrest.

The cars were parked approximately six hundred to seven hundred feet from the entrance to the Civic Center. Friedman marched the two defendants across the Civic Center parking lot to the Civic Center building. Friedman had the two place their hands on the outer wall of the Civic Center where he conducted a pat-down search and seized Bigley's gun. Friedman then marched the two inside the building. Once inside Friedman asked some Civic Center employees to call both the GBI and FBI and instructed the employees to tell them that the man from Atlanta had arrested the two suspects. Friedman and the two defendants then proceeded to the cloak room where Friedman remained with the two defendants.

Five to ten minutes later a Savannah police officer arrived. Friedman showed his credentials to the police officer. The policeman handcuffed the two defendants. Friedman then turned Bigley's pistol over to the policeman. At this point Friedman remembered that he had left the $63,000 in Dean's vehicle and that no one was standing guard over the vehicle. Friedman told the policeman he had money in the car and asked him if he would watch the two defendants while he went to the parking lot.

Friedman returned to Dean's car where he reached through the driver's door which was open and retrieved the vinyl folder containing the money from atop the transmission hump. The car was running so Friedman turned off the ignition. After retrieving the money, Friedman returned to the Civic Center. At this point, no FBI or GBI agents were present. Officer Christy, a Savannah police officer, had the two defendants in custody. A second Savannah police officer arrived approxi-

mately the same time that Friedman returned from the car.

Five to ten minutes after Friedman retrieved the money from the car the first FBI agent arrived. Shortly thereafter, GBI Agents Peters and Thorpe arrived at the Civic Center scene along with FBI Agents Henshaw and Snead. GBI Agent Peters informed the two defendants of their rights.

The entourage of GBI and FBI agents went out to the parking lot to the two cars. Friedman give the vinyl folder with the money to Agent Peters. Peters returned the folder to Friedman and asked him to place it back in the car in the same position as it was before Friedman removed it. Friedman reached in the car, placed the folder back on the transmission hump. Agent Thorpe then took photos of the vehicle. No one else entered Dean's car. The trunk was never open nor any other part of the car inspected. From this point on security was maintained around the vehicle. After the photographs, the vinyl folder containing the money was once again retrieved from the car by Friedman who gave it to GBI Agent Thorpe who brought it back to the GBI evidence vault.

Friedman testified that he was given back his athletic bag which contained just toilet articles, a t-shirt, and underwear when he arrived at the GBI Headquarters. However, Agent Thorpe testified he thought that the tennis bag was removed by Friedman after the photographic session in the parking lot.

After defendants were arrested, they were brought before this Court for a preliminary hearing. The bond was set on each defendant at $25,000. An affidavit for a search warrant to search Dean's vehicle was also presented to the Court by FBI Special Agent Maurice Snead. A search warrant was issued. However, both Dean and Bigley gave their full, willing and knowing consent to have their vehicles searched in Court. The Court gave both defendants an ample opportunity to speak with their

attorneys before allowing the two to consent to this search.

An inventory search was conducted of Dean's vehicle in his presence and in the presence of his counsel. That search ended at 8:25 p.m. on January 28, 1980. Polygraph papers, electronic bugging equipment, a pistol, lie detector, passports, and other items were seized from Dean's vehicle. Defendants now contend (1) that defendant Dean's vehicle was illegally seized by Friedman; (2) that the vehicle was improperly entered and searched prior to the issuance of a search warrant; and (3) the search warrant was invalid. The defendants further contend that Hirsch Friedman's conduct in representing himself to be an attorney for a group of Atlanta investors or businessmen and was such egregious conduct constituting a violation of defendant Dean's constitutional right to fundamental fairness.

CONCLUSIONS

A. Seizure of Evidence From Dean's Vehicle

The Court finds it need not address the issue of whether the search warrant issued for the search of Dean's vehicle was valid since defendant Dean gave his free and voluntary consent to the search. Defendant Dean contends that the arrest of defendants Dean and Bigley was an illegal arrest and the seizure of the automobile and its contents incident to the arrest was illegal.

Friedman attempted to arrest defendants under the authority of Georgia Code Annotated § 27-211 which provides in part: "A private person may arrest an offender, if the offense is committed in his presence or within his immediate knowledge . . . ." The arrest of Dean and Bigley by Friedman clearly falls under this code section. Friedman is a private person, and it was within his immediate knowledge that defendants were conspiring to violate the Federal Controlled Substances Act.

The Court finds no merit in defendant's argument that Friedman's seizure of the money from Dean's vehicle was an unlawful search of the car and thus invalidates Dean's consent. Friedman's intrusion into the car was for the sole purpose of preventing the loss of evidence, i.e., a precautionary measure to secure the $63,000 cash which was in open view to any passerby. The evidence which Dean seeks to suppress was seized from the trunk of the vehicle. The only part of the car entered by Friedman was the passenger compartment; he never entered the trunk. During the preliminary hearing, it was defendant's counsel who first suggested and volunteered that defendants consent to the search of their vehicle. The Court would not accept defendants' consent until defendants were given an opportunity to freely discuss the ramifications of such consent with their attorney. The Court allowed a ten minute recess for this purpose and upon reconvening, the defendants, through their attorney, stated they had no objection to having either defendant Bigley's car or defendant Dean's vehicle searched. The Court finds defendants' consent was free from any duress or coercion and was voluntarily given. The Court further finds the search of the trunk of defendant Dean's vehicle was valid and the evidence seized therefrom shall not be suppressed.

B. Government's Egregious Conduct

Defendants contend that the Government's use of an attorney as an undercover agent is such outrageous and unlawful investigative conduct that the indictment should be dismissed. The Court does not agree the alleged conduct of the Government approaches this "outrageous" level.

In *Hampton v. United States*, 425 U.S. 484 (1976), the Supreme Court considered this fundamental fairness defense in a situation involving the conviction of a defendant for selling heroin to a Government agent when

the heroin was supplied to the defendant by another Government agent. The Court in holding this conduct not to amount to a deprivation of defendants' due process rights, stated:

> "If the police engage in illegal activity in concert with a defendant beyond the scope of their duties the remedy lies, not in freeing the equally culpable defendant, but in prosecuting the police under the applicable provisions of state or federal law." *Hampton*, 425 U.S. at 483.

The Court finds no constitutional violations in Friedman's use of his position as an attorney to gain evidence against defendants Dean and Bigley. Although the Court expresses no opinion regarding an attorney acting as an undercover agent, if defendants feel Friedman has improperly or unethically used his professional position in this light, then the State Bar is the proper place to voice their grievances.

Defendants' motion to dismiss the indictment is hereby denied. Defendants' motion to suppress evidence seized from defendant Dean's vehicle is also denied.

This April 24, 1980.

/s/ B. Avant Edenfield
Judge
United States District Court
Southern District of Georgia

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

CR480-13

UNITED STATES OF AMERICA,
Plaintiff

vs.

ROSCOE EMORY DEAN, JR.
JOHN THOMAS BIGLEY,
Defendants

ORDER

On May 14, 1980, after seventeen (17) days of trial, a jury found defendants Dean and Bigley guilty on three counts of conspiracy to import drugs (marihuana, cocaine, and methaqualone) in violation of 21 U.S.C. § 963. In addition, defendant Bigley was found guilty of possessing a firearm during the commission of a felony in violation of 18 U.S.C. § 3924(c)(2). Currently before the Court is defendants' Rule 33 motion for a new trial and motion for an evidentiary hearing. This Order constitutes the Court's ruling on these motions.

Defendants base their motion for a new trial on the ground of newly discovered evidence. The alleged newly discovered evidence is:

1) The involvement of Governor Busbee's office in aiding the Government's chief witness, Attorney Hirsch Friedman, in obtaining a delay in the appeal of criminal convictions of two of Friedman's clients, also witnesses in the case against Dean;

2) An offer by Governor Busbee of $50,000 to Georgia Attorney General Arthur Bolton for use in the prosecution of defendant Dean;

3) That Governor Busbee requested Bolton to prosecute Dean even though Bolton advised the Governor otherwise;

4) That in December, 1979, the United States Attorney for the Southern District of Georgia, the United States Attorney for the Northern District of Georgia, and certain state prosecutors had reached the conclusion that no conspiracy existed involving defendant Dean; and

5) The date Hirsch Friedman was appointed as consultant/investigator for the Georgia Bureau of Investigation.

To prevail on a motion for new trial based on newly discovered evidence, a defendant must establish four prerequisites:

1) The evidence is newly discovered and was unknown to the defendant at the time of trial;

2) The evidence is material and not merely cumulative or impeaching;

3) The evidence would probably produce an acquittal; and

4) The failure to learn of the evidence was due to no lack of diligence on the part of the defendant.

United States v. Johnson, 596 F.2d 147, 148 (5th Cir. 1979).

Assuming arguendo that the five allegations of newly discovered evidence are true or could be proven during trial, the Court finds the four prerequisites for the granting of a new trial have not been met, nor through an evidentiary hearing could that hurdle be cleared.

Assuming this evidence to be newly discovered and that there was no lack of diligence on defendants' part (the first and fourth prerequisites) the Court finds that the evidence is not material and that it probably would

not produce an acquittal. The involvement of the Governor's office with the two criminal appeals of Friedman's clients would be useful merely for the purpose of impeaching the testimony of Friedman, his clients and possibly other Government witnesses.

Any offer by Governor Busbee to assist in financing a prosecution of Dean by the State of Georgia is immaterial to the issues tried before this Court. The Court does not feel this matter would be relevant to the entrapment defense with which the Court allowed the defendants to proceed. Further, this evidence would not produce an acquittal, inasmuch as this alleged action by Busbee was a response to his learning of an assassination threat by Dean against Busbee. Evidence of this threat was withheld from the jury; however, were a new trial to be granted on a newly discovered evidence basis, this highly prejudicial evidence would be admitted, thus lessening defendant Dean's chance of acquittal.

Likewise, the Court can find nothing material to the issues in this case in Governor Busbee's alleged request of Attorney General Bolton to prosecute Dean.

The Court finds that any pre-arrest meetings between prosecutors and law enforcement officials regarding an ongoing investigation of Dean and their opinions regarding the sufficiency of the evidence at that stage of the indictment is not *Brady* material required to be disclosed. Even if these opinions are viewed as *Brady* material, the *Brady* rule requires retrial only if the unproduced evidence creates reasonable doubt that did not otherwise exist concerning guilt of accused. *United States v. Beasley*, 576 F.2d 626, 630 (5th Cir. 1978). This evidence does not create a reasonable doubt that did not otherwise exist.

The date of the appointment of Hirsch Friedman as a consultant/investigator for the Georgia Bureau of In-

vestigation is immaterial and probably would not produce an acquittal.

Defendants' motions for a new trial and for an evidentiary hearing are hereby denied.

This 18th day of June, 1980.

/s/ B. Avant Edenfield
Judge
United States District Court
Southern District of Georgia

APPENDIX E

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT*
UNIT B

No. 80-7466

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
ROSCOE EMORY DEAN, JR., and JOHN THOMAS BIGLEY,
Defendants-Appellants.

Jan. 22, 1982

Appeal from the United States District Court
for the Southern District of Georgia

Before RONEY, VANCE and RANDALL, Circuit Judges.

VANCE, Circuit Judge:

Appellants Roscoe Emory Dean, Jr. and John Thomas Bigley were convicted after trial by jury on three counts of conspiracy to import cocaine, marijuana, and methaqualone in violation of 21 U.S.C. §§ 956, 963. Bigley alone was convicted on one additional count of using a firearm in the commission of a federal felony in viola-

---

* Former Fifth Circuit case, Section 9(1) of Public Law 96-452—October 14, 1980.

tion of 18 U.S.C. § 924(c)(2).[1] These crimes were committed as episodes in a tragicomic effort to enlist narcotics interests in Dean's campaign to become governor of the State of Georgia. Dean and Bigley allege numerous errors at trial.

In the summer of 1979 Dean, then a state senator in the Georgia legislature, asked James Chaffin to introduce him to someone with connections in the South American drug importation trade. Dean explained to Chaffin that he intended to solicit $10,000,000 from such a person for his 1982 gubernatorial campaign in exchange for his promise to facilitate the importation of drugs into Georgia if he were elected governor. Chaffin consulted with his attorney, Hirsch Friedman, and decided to act as a government informant in exchange for leniency in an unrelated state criminal prosecution against him. Friedman contacted the Georgia Bureau of Investigation which thereafter coordinated the probe.

Chaffin arranged for Dean and Friedman to meet August 24, 1979 on Jeckyll Island, Georgia. At that meeting, Dean explained his plan to assist the drug smugglers in exchange for campaign contributions. He also expressed his concern about surveillance devices and suggested that they speak in riddles. Dean's concern was well founded because this conversation was being recorded surreptitiously by Friedman, as were most of the later conversations between the two.

Dean and Friedman next met September 6, 1979 on Jeckyll Island. Dean added a number of details to his plan to facilitate importation as governor, including the appointment of narcotics interests to law enforcement

---

[1] Dean was sentenced to concurrent five year prison sentences and fined $10,000 for each offense. Bigley was sentenced to three concurrent one year prison terms for the conspiracy convictions and placed on three years probation for the firearms violation.

positions and the selective prosecution of rival drug importers. On October 12, 1979 Friedman brought Sergio Abreu to a meeting with Dean on Jeckyll Island. Abreu, a Florida law enforcement agent, posed as a Colombian involved in Friedman's drug organization. Dean informed Abreu that an associate of his, Richard Daily, was negotiating with narcotics interests in Tampa, Florida for additional campaign contributions. Dean stated that Daily was at a friend's house four or five minutes away from the hotel on Jeckyll Island at which they were meeting. That placed Daily in the proximity of the home of Dean's coappellant, Bigley.[2]

On November 5, 1979, Friedman informed Dean that Abreu had agreed to Dean's scheme. On January 9, 1980, however, Friedman told Dean that Abreu had died in an earthquake in Colombia, and that different arrangements would have to be made. Dean proposed that they meet on January 11, 1980 at Bigley's home on Jeckyll Island. At this meeting, which Bigley did not attend, Friedman told Dean that the narcotics organization wanted to test his trustworthiness by undertaking an importation at a site suggested by Dean. Although Dean expressed reservations about safety, he agreed to the test. He also expanded upon his plans to launder the $10,000,000 campaign contribution. The meeting was interrupted when a neighbor of Bigley appeared at the front door. Dean telephoned Bigley at his fiancee's house and directed him to tell anyone who inquired that Dean was meeting with his lawyer about the campaign.

Dean and Friedman agreed that Bigley, using the alias of "Moore," would meet Friedman at a bank in Savannah to count $10,000,000. Dean informed Friedman that Bigley was "in the thing with us" but did not know

---

[2] Bigley was employed at the time at a waste-water sewage treatment plant on Jeckyll Island. Evidence showed that he had been a political confederate of both Daily and Dean for a number of years.

Friedman's identity.[3] On January 18, 1980 Dean drove Bigley to a point several blocks from the bank. Bigley identified himself to Friedman as "Mr. Moore" and proceeded to count $7,500,000 contained in several safety deposit boxes in a bank vault. While counting, Bigley checked for counterfeits and carried on a general conversation with Friedman about marijuana from Colombia and gambling. Dean subsequently stated that Bigley expressed his suspicion that Friedman was a government agent.

During the next week, Dean and Friedman undertook a "dry run" of the trial drug importation.[4] Dean reported to Friedman that Bigley had observed the local police station during the exercise and that Bigley had later gone to Miami to meet with a Haitian about laundering the money.

On January 28, 1980 Dean and Friedman drove to the Savannah airport accompanied by Bigley in a separate car. Dean's purpose was to receive custody of the $10,000,000. When Bigley arrived at the airport, he noticed frantic activity by law enforcement personnel. He waved down Dean and Friedman and informed them of what he had seen. Soon thereafter, Friedman effectuated a citizen's arrest and confiscated a Smith and Wesson .38-caliber revolver that Bigley carried in a shoulder holster.

At trial, Dean declined to testify on his own behalf. Bigley testified that he had no knowledge of the narcotics-related purpose of the dealings between Dean and Friedman, but had been told by Dean that the $10,000,000 was part of a legitimate real estate transaction. He also

---

[3] Dean also stated that Bigley did not know about the narcotics-related purpose of the meetings between Dean and Friedman. The jury was of course free to believe or disbelieve this statement.

[4] Dean played a major role in the planning of this dry run.

denied that he had observed the local police station for Dean or had made any arrangements to launder money.[5]

I.

Both appellants challenge the sufficiency of the evidence against them on the conspiracy counts. The bases for these challenges differ. Bigley claims that the government failed to prove beyond a reasonable doubt that he conspired with Dean to violate the narcotics laws. Dean claims that his conviction cannot stand if Bigley is acquitted because Bigley is the only person with whom Dean is accused of conspiring. *See, e.g., United States v. Sheikh*, 654 F.2d 1057, 1062 (5th Cir. 1981); *United States v. Espinosa-Cerpa*, 630 F.2d 328, 331 (5th Cir. 1980). We find that the evidence was sufficient to convict both Dean and Bigley of conspiracy to import narcotics.

The standard of review as to sufficiency of the evidence is whether a reasonably minded jury must necessarily entertain a reasonable doubt of the defendant's guilt. *United States v. Rodriguez*, 654 F.2d 315, 317 (5th Cir. 1981); *United States v. Kelley*, 630 F.2d 302, 303 (5th Cir. 1980). In conducting that review, we view the evidence in the light most favorable to the government, *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942), and we accept all credibility choices and draw all reasonable inferences that support the jury's verdict. *United States v. Staller*, 616 F.2d 1284, 1292 (5th Cir.), *cert. denied*, 449 U.S. 869, 101 S.Ct. 207, 66 L.Ed.2d 89 (1980); *United States v. Barrentine*, 591 F.8d 1069, 1083 (5th Cir.), *cert. denied*, 444 U.S. 990, 100 S.Ct. 521, 62 L.Ed.2d 419 (1979).

In order to sustain the convictions of Dean and Bigley, it must appear that both men agreed to violate the nar-

[5] Bigley admitted traveling to Miami on the date in question, but claimed that the purpose of his visit was to meet his fiancee's parents.

cotics laws. *United States v. Diaz*, 655 F.2d 580, 584 (5th Cir. 1981) *cert. denied*, —— U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, 50 U.S.L.W. 3567 (1982). *See also United States v. Spradlen*, 662 F.2d 724, 727 (11th Cir. 1981). The government need not show that either man committed an overt act in furtherance of the conspiracy. *United States v. Rodriguez*, 612 F.2d 906, 919-20 n.37 (5th Cir. 1980) (en banc), *aff'd sub nom. Albernaz v. United States*, 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981); *United States v. Michel*, 588 F.2d 986, 994 (5th Cir.), *cert. denied*, 444 U.S. 825, 100 S.Ct. 47, 62 L.Ed.2d 32 (1979). The existence of an agreement may be inferred, however, from the concert of action between the two men. *United States v. Wilson*, 657 F.2d 755, 759 (5th Cir. 1981); *United States v. Arredondo-Morales*, 624 F.2d 681, 684 (5th Cir. 1980).

In this case, the only serious question of appellants' guilt is whether Bigley knew of the narcotics-related objective of the dealings between Dean and Friedman. Taken in the light most favorable to the government, the evidence shows:

(1) Dean's statement to Friedman that Bigley was "in the thing with us."

(2) The meeting between Dean and Friedman at Bigley's house.

(3) Dean's instructions to Bigley to offer an explanation to Bigley's neighbors of Dean's presence.

(4) Bigley's use of the alias agreed upon by Dean and Friedman.

(5) The meeting between Bigley and Friedman at the bank to count millions of dollars and their discussion of marijuana from Colombia.

(6) Dean's statement that Bigley suspected Friedman of being a government agent.

(7) Bigley's meeting with a Haitian in Miami to arrange for the laundering of the $10,000,000.

(8) Bigley's activities around a police station during a "dry run" of narcotics importation.

(9) Bigley's travel to the Savannah airport with Dean and Friedman while carrying a firearm.

(10) Bigley's departure from the Savannah airport to warn Dean and Friedman of the activity of law enforcement personnel.

This evidence certainly suffices to allow a reasonable jury to discredit Bigley's statement that he believed he was assisting a real estate transaction. *Cf. United States v. Hinds*, 662 F.2d 362, 366 (5th Cir. 1981); *United States v. Spradlen*, 662 F.2d at 727 (jury could reasonably disbelieve defendant's innocent explanation of events). It also suffices to establish beyond a reasonable doubt that Bigley knew of the narcotics-related purpose of the activities involving himself, Dean, and Friedman. This is not a case in which the only evidence of Bigley's guilt is association with other conspirators, *see, e.g., United States v. DeSimone*, 660 F.2d 532, 537-38 (5th Cir. 1981); *United States v. Reyes*, 595 F.2d 275, 280-81 (5th Cir. 1979), or activity that is suspicious though reasonably susceptible of an innocent interpretation. *See, e.g., United States v. Glasgow*, 658 F.2d 1036, 1040-42 (5th Cir. 1981); *United States v. Littrell*, 574 F.2d 828, 832-33 (5th Cir. 1978). Here, actions such as preparing for the laundering of money, observing a police station during a dry run of a narcotics importation, and warning Dean and Friedman of police activity at the airport leave no reasonable doubt that Bigley knew that the purpose of the activities in which he and Dean were engaging was criminal. *See United States v. Robertson*, 659 F.2d 652, 656-57 (5th Cir. 1981); *United States v. Alvarez*, 625 F.2d 1196, 1198-99 (5th Cir. 1980) (en banc), *cert. denied*, —— U.S. ——-, 101 S.Ct. 2017, 68 L.Ed.2d 324 (1981). These actions, taken together with the state-

ment by Dean that Bigley was in the organization, Bigley's reported statement that Friedman was a government agent, and comments by Bigley regarding narcotics while he was counting out the millions of dollars to be used in the drug deal, leave no reasonable doubt that Bigley knew that the criminal activity in which he was involved was related to narcotics. *See, e.g., United States v. Mesa*, 660 F.2d 1070, 1074-75 (5th Cir. 1981); *United States v. Hernandez*, 646 F.2d 970, 979 (5th Cir. 1981).[6]

Although we find that there was sufficient evidence of a conspiracy to violate the narcotics laws, there is insufficient evidence to prove the existence of three separate agreements as alleged in the indictment. The government concedes as much in its brief. Since Dean was assessed a $10,000 fine for each count, this error was not harmless under the concurrent sentence doctrine. We therefore vacate Dean's sentence and remand this case to the trial court with instructions that the convictions of Dean on two conspiracy counts, at the election of the government, be reversed and dismissed. The conviction on the remaining conspiracy count shall be deemed affirmed and the trial court shall resentence Dean on that one count. *See United States v. Bradsby*, 628 F.2d 901, 906 (5th Cir. 1980). Although the error may be harmless with respect to Bigley, we conclude that the same disposition should be made in his appeal from the conspiracy convictions. *Id.* His conviction on the firearms count, however, is affirmed and the sentence that has been imposed by the trial court on that count shall remain in force.

II.

Bigley asserts that the trial court erred in admitting Dean's hearsay statements against Bigley under the co-conspirator exception of rule 801(d)(2)(E) of the Fed-

[6] Because we find that the evidence was sufficient to convict Bigley, we necessarily find that Dean's sufficiency argument which was premised upon the proposition of Bigley's innocence must fail.

eral Rules of Evidence. We conclude that the trial court committed no error in this regard.

Our decision in *United States v. James*, 590 F.2d 575, 582-83 (5th Cir.) (en banc), *cert. denied*, 442 U.S. 917, 99 S.Ct. 2836, 61 L.Ed.2d 283 (1979), holds that evidence is admissible under the coconspirator exception only if it appears by the close of all the evidence that the government has shown by a preponderance, independent of the declarant's statements, that a conspiracy existed, that the defendant and the declarant were members of that conspiracy, and that the statements were made in furtherance of the conspiracy. *See also United States v. Chaney*, 662 F.2d 1148, 1153 & n.6 (5th Cir. 1981); *United States v. Horton*, 646 F.2d 181, 185 (5th Cir. 1981). Within our scheme in *James*, the primary responsibility for determining the admissibility of the challenged statements belongs to the trial judge. *United States v. Perry*, 624 F.2d 29, 31 (5th Cir. 1980); *United States v. Grassi*, 616 F.2d 1295, 1300 (5th Cir.), *cert. denied*, 449 U.S. 956, 101 S.Ct. 363, 66 L.Ed.2d 220 (1980). The trial judge is obliged to consider the evidence of both the defendant and the government. *United States v. Ricks*, 639 F.2d 1305, 1309 (5th Cir. 1981). We will not overturn the judge's finding based upon his consideration of the merits of each side unless it is clearly erroneous. *United States v. Perry*, 624 F.2d at 30-31.

In this case, the independent evidence included, *inter alia*, Bigley's use of the alias agreed upon by Dean and Friedman, Bigley's discussion of narcotics while counting money in the bank vault, Bigley's departure from the airport when he observed police, and his efforts to warn Dean and Friedman not to go to the airport. Evidence on Bigley's behalf included statements by Dean that Bigley did not know about narcotics and Bigley's own testimony that he believed he was involved in a real estate transaction.

We cannot say, based upon this evidence before the trial judge, that he committed clear error in finding that the government has proved the existence of a conspiracy between Dean and Bigley by a preponderance. Evidence similar to that which the government presented has been found by courts to be probative of the existence of a conspiracy between a declarant and a defendant. *See, e.g., United States v. Chaney*, 662 F.2d at 1153 (use of alias agreed upon by defendant and declarant); *United States v. Mesa*, 660 F.2d at 1074-75 (conversations at prearranged sites with others in conspiratorial group); *United States v. D'Amato*, 493 F.2d 359, 365 (2d Cir.), *cert. denied*, 419 U.S. 826, 95 S.Ct. 43, 42 L.Ed.2d 50 (1974) (evasive action to avoid police surveillance); *United States v. Bickford*, 445 F.2d 829, 830 (1st Cir.), *cert. denied*, 404 U.S. 946, 92 S.Ct. 302, 30 L.Ed.2d 262 (1971) (alerting coconspirator and informant that someone was approaching). Also, we cannot on this record fault the trial judge for making credibility choices unfavorable to the defense. *Cf. United States v. Hernandez*, 646 F.2d at 973 (trial judge does not credit defendant's story that he did not know that the boxes he loaded into agent's car contained narcotics); *United States v. LaFerriere*, 546 F.2d 182, 184 (5th Cir. 1977) (trial judge does not credit defendant's story that he did not know that certain payments were unauthorized).

III.

Dean asserts that the government entrapped him into committing the offenses of which he has been convicted. This court has held that "when entrapment is at issue, the focal point of the inquiry is on the predisposition of the defendant." *United States v. Webster*, 649 F.2d 346, 348 (5th Cir. 1981) (en banc). The defendant must initially produce evidence that the government's conduct "created a substantial risk that the offense would be committed by a person other than one ready to commit it." *United States v. Tobias*, 662 F.2d 381, 384 (5th Cir.

1981) (quoting *United States v. Mosley*, 496 F.2d 1012, 1014 (5th Cir. 1974)). If the defendant carries that burden, the government must prove beyond a reasonable doubt that the defendant was predisposed to commit the crime charged. *United States v. Tobias*, 662 F.2d at 384; *United States v. Dickens*, 524 F.2d 441, 444 (5th Cir. 1975), *cert. denied*, 425 U.S. 994, 96 S.Ct. 2208, 48 L.Ed. 2d 819 (1976).

We conclude that Dean's argument is totally devoid of merit. It would be ludicrous to believe that one who solicits millions of dollars in exchange for promises to appoint narcotics figures to government office and to prosecute selectively competing drug smugglers is predisposed to do anything but deal in drugs. If Dean was entrapped, it was in the web of his own ambition.[7]

IV.

Appellants raise a number of other arguments, none of which have merit. We conclude, therefore, that this case should be remanded with instructions as set forth in Part I of this opinion.

AFFIRMED IN PART, VACATED IN PART AND REMANDED.

---

[7] Dean argues that even if the government's conduct in this case does not constitute entrapment, it was sufficiently outrageous to violate due process principles and to invoke the exercise of this court's supervisory powers to overturn the convictions. *See Hampton v. United States*, 425 U.S. 484, 495 n.7, 96 S.Ct. 1646, 1653 n.7, 48 L.Ed.2d 113 (1976) (Powell, J., concurring); *United States v. Twigg*, 588 F.2d 373, 377-81 (3d Cir. 1978). This court has recently considered the "outer limits" of permissible conduct by the government in pursuing the end of ferreting out crime. *United States v. Tobias*, 662 F.2d 381, 385-387 (5th Cir. 1981). The conduct by the government in this case falls well within those limits. Dean's argument for reversal is therefore totally devoid of merit.